RHINA BHAR

v.

MALAYSIAN BAR

HIGH COURT, KUALA LUMPUR
DATO' ANUAR BIN DATO' ZAINAL ABIDIN J.
[ORIGINATING SUMMONS NO. 17-41-1993]
4 OCTOBER 1993

LEGAL PROFESSION: Legal Profession Act 1976 - Plaintiff suspended from practicing as advocate and solicitor - Appeal to High Court - Further appeal to Supreme Court - Bar Council objected to a Council member appearing as counsel for plaintiff in appeal to Supreme Court - Whether objection proper - Whether there was conflict of interest and embarrassment - Duty of solicitor - Legal Profession (Practice and Etiquette) Rules 1978 rr. 3(a), 16.

CONSTITUTIONAL LAW: Federal Constitution, Art. 5 - Whether plaintiff deprived of her constitutional right to counsel.

The plaintiff, a practicing advocate and solicitor, was suspended from practice by a Disciplinary Committee convened under the Legal profession Act 1976. She appealed against the suspension to the High Court at Penang and upon the appeal being disposed of against her, lodged a further appeal to the Supreme Court. At the first appeal to the Penang High Court the plaintiff was represented by Mr. R.R Sethu who was a Council Member of the defendant. There was then no objection by the defendant to Mr. R.R Sethu so appearing. However, when the case came before the Supreme Court the defendant intervened on the grounds, first,that there was a conflict of interest facing Mr. R.R Sethu and second, that Mr. R.R Sethu's appearance would cause undue embarrassment to the defendant. The plaintiff applied for a declaration that the decision of the defendant that Mr. R.R Sethu ought not to appear for her was unconstitutional, illegal and of no effect.

Held:

[1] There is no evidence or allegation to indicate that Sethu, whose interests are interlinked with that of the plaintiff has any dual interest creating any conflict. The law cannot take cognisance of undue sensitiveness and if at all the occasion so arises that Sethu has to allege and substantiate any inadequacy on the part of the defendant, the duty of the defendant is to rebut the contentions and not prevent the issue being raised.

[2] As exploration of law by the highest tribunal of the land is one of the contingencies that we have to contend with, it cannot be visualised that any embarrassment will be caused to the Bar Council by the court allowing this application. Furthermore, even if the application is refused and therefore Sethu cannot appear for the plaintiff, it is inconceivable how it will help the Bar Council except for the apparent unity of the Council members. Such a refusal, on the other hand, will not only cause great hardship and inconvenience to the plaintiff but will also deprive her of her fundamental constitutional right.

[Application granted].

Cases referred to:

Datuk Syed Kechik Bin Syed Mohamed v. Government of Malaysia & Anor. [1979] 2 MLJ 101 ***(refd)***

Majlis Peguam v. Joseph Au Kong Weng [1993] 1 CLJ 417 ***(refd)***

Legislation referred to:

Legal Profession Act 1976

Legal Profession (Practice and Etiquette) Rules 1978, rr.16, 20

Other sources referred to:

Codrey on **Solicitors**

For the plaintiff - Rajasingam and C.K.G. Pillai; M/s. Rajasingam & Co.

For the defendant - Haji Sulaiman bin Abdullah; M/s. Zain & Co.

JUDGMENT

Anuar bin Dato' Zainal Abidin J:

The plaintiff in this originating summons, heard as a matter of urgency on 16 and 29 September 1993 by this Court is a practising advocate and solicitor, Rhina Bhar. She applies to this Court for a declaration that the decision of Bar Council, the defendant, that R.R. Sethu, her intended Counsel in her Supreme Court Civil Appeal No. 02-107-92 scheduled for hearing on 11 October 1993 ought not to appear, is unconstitutional, illegal, inoperative, null and void and of no effect.

The brief history of the case, insofar as relevant to this application is as follows.

On 19 June 1991, the plaintiff was suspended for three months by a disciplinary committee

convened under the Legal Profession Act 1976. An appeal against the decision by the plaintiff was heard by three judges in Penang High Court in which R.R. Sethu appeared for her together with another counsel Ghazi Isak. This appeal was finally disposed of on 21 February 1992 and the plaintiff was unsuccessful (Application for stay was granted). She then appealed to the Supreme Court which was fixed for hearing on 19 July 1993.

At this juncture, it is interesting to note that in these proceedings the Bar Council, the present defendant in this Originating Summons was not cited as a party. The Bar also did not choose to intervene in the proceeding although the representatives attended the hearing.

In another development three days prior to the Supreme Court hearing, the Bar Council is alleged to have decided to object to R.R. Sethu appearing for the plaintiff in the Supreme Court apparently on grounds of conflict of interest and embarrassment. This decision took the plaintiff by surprise. In any event when the Supreme Court sat on 19 July 1993, Tuan Haji Sulaiman bin Abdullah, together with another representative Paul Manecksha, both advocates and solicitors appeared for the Bar Council and raised objection against R.R. Sethu representing the plaintiff. It is not evident in what capacity they suddenly appeared as they were not a party to the proceedings but the point is irrelevant as our Courts are open to anyone. In fact sometimes the Court invites Counsel to appear as amicus curiae. Following the objection by Haji Sulaiman, the case was adjourned to 11 October 1993 probably to resolve the propriety or otherwise of R.R. Sethu appearing at the hearing. There are diverse versions of what transpired at the Supreme Court and I am unable to decide the exact nature of the situation which took place there. No transcript of notes by the learned Judges of the Supreme Court has been produced to assist me. However, I would assume that the Supreme Court did not resolve the dispute one way or the other although they could have offered observations with a view to settle the dispute amicably between the parties. The above chain of events led to the present originating summons.

Before discussing the cardinal point, at the outset, I must express my disappointment at the acrimonious and confrontational attitudes displayed by the parties in their correspondence, copies of which were produced before me. For fear of enlarging the conflict between a parent body and its members, I refrain from any further comments as the issues before me could be decided irrespective of the irrelevant details of the correspondence between them and the innuendos in the affidavits.

The first point occurring to my mind is whether this Court has the jurisdiction to make the declaration sought. Numerous authorities have been quoted before me apart from the Court doing its own research but I need not rely on them to arrive at my decision except to the bare minimum. The scope of declaratory remedy was thoroughly explored by the then Federal Court in the case of *Datuk Syed Kechik Bin Syed Mohamed v. Government of Malaysia and Anor.* [1979] 2 MLJ 101. The upshot of the decision in the words of the then Borneo Chief Justice Lee Hun Hoe is:

> The prevailing view seems to be that the Courts jurisdiction to make a declaratory order is unlimited only to its own discretion. In granting a declaration the Court has to consider the utility of the declaration claimed and the usefulness of declaration on the one hand as against the inconvenience and embarrassment that may result on the other hand. As to the determination of future right its importance for certain purpose is not in doubt, particularly when a mere declaration is usually the only remedy.

In the same case of *Datuk Syed Kechik,* the Federal Court quotes with apparent approval a passage from an American author E.M. Borchard on declaratory judgments:

> Referring to those cases where no traditional wrong has yet been committed or immediately threatened a condition of affairs is disclosed which indicates the existence of a cloud upon the plaintiff's rights, a cloud which endanger his peace of mind, his freedom and his pecuniary interests. This is tangible interest which the law protects against impairment and by promoting it, promotes social peace.

I feel the above view is a guide to me in deciding this case. Another illuminating legal literature relevant to the issue is summarised in United Kingdom Supreme Court Practice. The notes under O.15 r. 16 under the heading Future Rights reads

> **Future rights** - The Court has jurisdiction as to rights depending upon a future event

but the practice is not in ordinary cases to make such a declaration unless:

(a) a present right depends on the decision or
(b) all parties interested in any event are *sui juris* or
(c) there are special circumstances ...

A declaration will not be made where it would serve no useful purpose e.g. that the plaintiff is entitled to do something which is notoriously against the rules of his profession and which he does not intend to do.

Bearing in mind cautiously the above guidelines, let me analyse the objection of defendant for Sethu to appear for the appeal.

At one stage the Bar Council did not have any objection for R.R. Sethu to appear for the plaintiff. Even now, the Council seems to raise no objection if Sethu as Counsel does not rely on one Joseph Au Kong Weng's case that would allegedly require the plaintiff to allege that the defendant and Council had breached the Act, meaning Legal Profession Act. The Council adds that Sethu as a current Council member is placed in a position of conflict of interest and embarrassment.

Before I consider other aspects of the case, let me pause here to discuss the effect of forbidding Sethu to rely on *Joseph Au Kong Weng's* case. I understand that the defendant in its hurried affidavit is referring to the Supreme Court case of *Majlis Peguam v. Joseph Au Kong Weng* reported in [1993] 1 CLJ 417 affirming the decision of High Court that compliance with the time frame for institution of disciplinary proceedings against lawyers under the Legal Profession Act 1976 is mandatory. To my mind neither the Bar Council nor any body other than a competent Court of law has the right to fetter the discretion of a counsel. The duty of an advocate and solicitor is summarised in r. 16 of the Legal Profession (Practice and Etiquette) Rules 1978 which says:

An advocate and solicitor shall while acting with due courtesy to the tribunal before which he is appearing, fearlessly uphold the interest of his client, the interests of justice and dignity of the profession without regard to any unpleasant consequences either to himself or to any other person.

It is a fallacy to assume that Counsels' submissions are the *criteria* for Court adjudication although the Court depends upon the Counsel to assist the Court without misleading it. In fact the obligation of the Counsel to rely on precedents is clear cut in r. 20 of the Legal Profession (Practice and Etiquette) Rule 1978 which states:

An advocate and solicitor shall put before the Court any relevant binding decision of which he is aware which is immediately in point, whether it be for or against his contention.

It is highly presumptuous on the part of anyone to ignore the fact that it is the Court which controls the proceeding and decides questions like what is relevant and admissible and what is the overall effect. It is not the function of Counsel, however eminent he is. Another question which occurs to my mind is "does revealing the true state of law as reported in the Law Journal and relying on it" cause any embarrassment? Truth should never hurt anyone. Before the appeal is heard, it will be premature for any third party other than the tribunal hearing the case to presuppose the course that the hearing will take. Mr. Sethu has indicated that as far as he is concerned there is no embarrassment. Embarrassment is a subjective phenomenon. It is ironic that such possibility is attributed to senior Counsel as Sethu whom the Bar admits elsewhere in the correspondence as a man on whom the Bar Council "has the highest respect for competence and professional intergrity". If it is so, why not grant him the independence to act, if he chooses? By contending that there is conflict of interests and embarrassment does the action of the Bar not display a veiled threat?

Regarding embarrassment and conflict of duty, let us peruse what the Legal Profession Act says. Rule 3 (a) reads:

An advocate and solicitor shall not accept a brief if he is or would be embarrassed.

(b) An embarrassment arises -

(i) Where the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to same matter;
(ii) Where there is some personal relationship between him and a party or a witness in the proceedings.

At the material time, when the complaint arose, Sethu was in the United Kingdom and it is obvious he had no involvement in the disciplinary action against the plaintiff. In any case there is neither any allegation nor any evidence to indicate that Sethu, whose interests are

interlinked with that of plaintiff has any dual interests creating any conflict even by common law standard. If at all the occasion so arises that Sethu has to allege and substantiate any inadequacy on the part of the defendant, Bar Council, it has to be accepted in good democratic spirit. The duty of the defendant is to rebut the contentions if justified and not prevent the issue being raised. This Court cannot equate the position of Bar Council as that of a Cabinet which has to speak by convention with one voice. In the legal world, when often abstract rights are in dispute, it is not uncommon for a decision of a lower body to be criticised before a higher tribunal by aggrieved party, often without cause and the law cannot take cognisance of undue sensitiveness. Apart from narrow definition of conflict of duties in the Legal Profession Act, I have personally done some research on the question. Codrey on **Solicitors** states generally, in the opinion of the Council of the Law Society, a solicitor who is a member of public authority should not be professionally engaged in any proceeding to which the authority is a party or in any matter in which it is **directly** interested. (Underlining is mine). If exceptional circumstances justify any departure from this general rule it is the duty of the solicitor to ensure that the interests of the authority are already protected. Even assuming that the Bar Council can be equated as a public authority, they are not directly involved in the absence of any attempt to intervene in the proceedings. In any case what is the interest to be protected? Is it a cover up for omission probably made in ignorance of anticipated changes in interpretation of law? If so, is it not better to ratify the position rather than avoid the issue? Anyway, the effect of the precedent in dispute is a matter for argument before the Supreme Court and my casual comments must not be misconstrued. In my opinion, the whole crux of the doctrine of conflict of interests is to prevent probability of abuse of confidence, which is not applicable in the present case.

Reverting to the point of using my discretion one point strongly urged on behalf of the plaintiff is the constitutional right of any citizen under Article 5 to have the services of a Counsel of his or her choice. I am aware that this right is subject to practical limitations. In this case, Sethu is willing, ready and able to act as Counsel. He is well aware of the facts of the case having acted as Counsel in the High Court and having been in charge of the proceedings until the impending "crisis", if I may say so, arose. One relevant fact I bear in mind in exercising my discretion is the fact that the subject matter of the complaint must have arisen more than six years ago, 17 August 1987 being the date the Bar Council referred the complaint to the local Bar Committee. The plaintiff has stated on oath that she finds it almost impossible to find alternative Counsel of standing to argue the appeal. This contention has not been rebutted. She is entitled for her faith and belief and the appeal to be determined without having to search grudgingly another Counsel.

Before I decide one way or another I have to apply my mind whether the declaration has any utility. If so, it should be balanced against the inconvenience and embarrassment of the Bar Council. If the declaration is not granted it will cause great hardship and inconvenience to the plaintiff as the appeal involves apparently her sole career. On the other hand, there will be no serious inconvenience for the Bar Council if a declaration is granted as prayed. I cannot visualise any embarrassment for the Bar Council among right thinking members of the Bar or public as exploration of law by the highest tribunal of the land is one of the contingencies we have to contend with. Law can never remain static. Even if I refuse a declaration and Sethu cannot appear, it is inconceivable how it will help the Bar Council except for the apparent image of unity of the Council members, while causing hardship to the plaintiff and depriving her of her fundamental constitutional right. Although the image of the Bar is not an issue with any evidence to comment, it is not irrelevant to point out that according to repeated newspaper reports, such unity is lacking very often and I wonder whether an isolated incident of criticism of the Bar will have any real tangible consequence. The net result may be ultimately another counsel will be found with hardship to the plaintiff and he will probably put forward the same criticism against the Bar perhaps less charitably than Mr. Sethu who is admitted by the Bar to be a distinguished lawyer of high integrity.

In the circumstances, I hereby grant the first declaration. At the same time, with regards to prayer in (c) I amend the wordings of the prayer and grant declaration to the effect that R.R. Sethu is and shall be at full liberty to appear for the plaintiff in the said Civil Appeal without any

restriction by the Bar Council, the defendant, to the mode and manner of his performance of his duties within the meaning of Legal Profession (Practice and Etiquette) Rules 1978 and without the risk of any penalty under the law. I substitute this wording to avoid any ambiguity and to reflect the considered judgment of the Court to do justice to the plaintiff and her counsel R.R. Sethu as well as to the defendant.

I must emphasise that in my decision I am only concerned with the legal propriety of any order/direction given by defendant restraining or restricting the audience of Sethu on behalf of plaintiff in the relevant Supreme Court Appeal. No other issue was substantially canvassed before this Court by any party. As each case is decided on its own facts, this decision should not therefore be construed as fettering the statutory discretionary powers of the defendant who is doing a difficult job in very trying circumstances. Although I find against them on the particular facts, I do not attribute any wilful *mala fide* on their part and accordingly I order each party to bear its own costs.

Before I conclude I must thank counsel for both parties for arguing painstakingly this novel point of interpretation.

SALCON ENGINEERING SDN. BHD.

v.

PRM ENERGY SYSTEMS (M) SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' ANUAR BIN DATO' ZAINAL ABIDIN J.
[CIVIL SUIT NO. S1-22-182-1993]
27 MAY 1993

INJUNCTION: Effect of non-disclosure of material facts on injunction granted ex-parte - Whether injunction should be discharged forthwith - Whether court should consider merits of case despite non-disclosure - Both parties represented by counsel at inter-partes hearing - Whether issue of non-disclosure relevant.

The plaintiff applied for and obtained *ex-parte* a Mareva injunction against the defendant. At the *inter-partes* hearing to discharge or continue the injunction, the defendant alleged that there was non-disclosure of material facts by the plaintiff at the *ex-parte* application and contended that if the plaintiff was infact guilty of such non-disclosure, the court should forthwith discharge the injunction without inquiring further into the merits of the case. Several recent decisions of the English Courts were cited by the defendant in support of the contention.

The Court nevertheless refused to follow the English decisions on the grounds that the approach adopted therein was impractical of application and secondly that those cases were based on policy grounds to prevent what must be an abuse in the English system.

The issues that arose were:

(1) Whether the plaintiff was infact guilty of non-disclosure; and
(2) Whether upon proof of non-disclosure of material facts, the Court ought to discharge forthwith an injunction granted *ex-parte* or whether, before discharging or continuing such injunction, the Court ought to look into the totality of the evidence before it be there non-disclosure of material facts or not.

Held:

[1] It is impractical to require that virtually every document and every issue between the parties be disclosed at the *ex-parte* stage. This requirement will result in the Court being encumbered with a forensic study on the question